C. W. CLARKE, BY
PRESTON NUTTER CORPORATION
HIS ATTORNEY IN FACT

IBLA 70-144 Decided December 23, 1971

Scrip: Generally -- Scrip: Payment in Satisfaction -- Scrip: Special Types of Scrip

An application filed pursuant to the Act of August 31, 1964, by which applicant elects to receive cash instead of land in satisfaction of a forest lieu selection right, is properly rejected as to 40 acres, which had been cancelled from a lieu selection patent by a court decree, based upon the court's finding that the selector had filed false and fraudulent affidavits in procuring the patent, because the fraud was the fault of the selector and for that reason the 40 acres do not come within the savings clause of the proviso to the Act of March 3, 1905, which repealed the forest lieu selection provisions of the Act of June 4, 1897, as amended, and which provides that if for any reason not the fault of the party making the same any pending selection is held invalid, another selection for a like quantity of land may be made in lieu thereof.

Cash payment should not be made to an applicant under the Act of August 31, 1964, for 3.59 acres of a forest lieu selection right, where the Bureau of Land Management held that the selector used 280 acres when he selected 276.41 acres which had been patented and that the 3.59-acre difference was forfeited due to the lieu selection right being in the nature of a land exchange in which patents are usually issued in public land survey units of 40 acres.

IBLA 70-144 : ES-5883

C. W. CLARKE, by : Election PRESTON NUTTER CORPORATION, a
NEVADA CORPORATION, his Attorney in Fact : to receive
: cash instead of land
: in satisfaction of
: forest lieu selection
: claim rejected in part

: Affirmed

DECISION

This is an appeal by Preston Nutter Corporation, attorney in fact for C. W. Clarke, from letter decision of May 6, 1970, by the Assistant Director, Bureau of Land Management, which partially rejected its application filed pursuant to section 6 of the Act of August 31, 1964 (78 Stat. 751) and regulation 43 CFR 2221.2-3 (1970), by which it elected to receive cash instead of land in satisfaction of its forest lieu selection claim. The election was filed for 243.59 acres of purportedly unsatisfied selection rights. The Bureau certified payment for 200 acres and rejected the application as to 43.59 acres.

The case is based upon the conveyance by C. W. Clarke of 520 acres of land in the Sierra Forest Reservation in California to the United States on July 12, 1900, as a result of which he received the right, pursuant to the Act of June 4, 1897 (30 Stat. 11, 36), as amended by the Act of June 6, 1900 (31 Stat. 588, 614), to select, in lieu thereof, 520 acres of vacant, surveyed, nonmineral public lands which are subject to homestead entry. Clarke thereafter appointed Preston Nutter as his attorney in fact to exercise his selection right.

In 1901, C. W. Clarke by Preston Nutter, his attorney in fact, filed application Phoenix 013384 for lieu selection of 13 unsurveyed tracts of land described by metes and bounds and containing approximately 40 acres each in Arizona. 1/ Following the survey of the public lands encompassing 8 of these tracts, the 8

1/ A total of approximately 520 acres.

tracts were adjusted to the survey and patents Nos. 986229 and 1093346 were issued on September 28, 1926, and October 21, 1937, respectively, for a total of 316.41 acres. 2/ This left 5 tracts embraced in the application for selection for final action, which were described by metes and bounds within a certain township, the plat of survey of which was officially filed on June 28, 1949, indicating the locations and descriptions of these tracts.

However, no action was taken thereafter by the applicant to adjust the 5 remaining tracts to the plat of survey. This was apparently due to the death of Preston Nutter on January 26, 1936. By Decree of Distribution dated December 14, 1939, the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah, decreed that all of the residue of the property belonging to Nutter's estate "hereinafter particularly described, together with any other property which may hereafter be discovered belonging to said decedent," be distributed in equal shares to his surviving widow and his two surviving daughters. The subject selection right was not listed in the Decree of Distribution, but passed to the distributees under its residuary clause. On August 1, 1957, Nutter's widow and daughters assigned all of their right, title, and interest in the scrip to the Preston Nutter Corporation, the appellant herein.

On January 14, 1958, the appellant corporation duly recorded the forest lieu selection right with the Director, Bureau of Land Management, pursuant to the provisions of the Act of August 5, 1955 (69 Stat. 534, 535).

In 1964 the Bureau of Land Management forwarded the case record of Phoenix 013384 to its Arizona State Director with instructions to take final action on the 5 tracts, totalling 200 acres, remaining in the application. On October 5, 1967, the Arizona land office rejected the application as to these tracts because "They are within a township which is almost totally public domain land and which is being classified for multiple use management in federal ownership." This decision became final because of the applicant's failure to appeal.

2/ This apparently left 203.59 acres of the selection right still unsatisfied. However, in a suit brought by the United States, the United States District Court for the District of Arizona cancelled patent No. 986229 as to 40 acres on August 16, 1935, the court having found that the patent was issued upon false and fraudulent affidavits filed by Preston Nutter. Thus, the appellant reasoned that it was entitled to receive payment for 243.59 acres of unsatisfied selection rights.

Preston Nutter Corporation filed its election to receive cash for 243.59 acres on June 30, 1969, ES-5883. The Bureau of Land Management thereafter certified payment of $55,200 for 200 acres at the rate of $276 an acre, which was paid by United States Treasury check. On May 6, 1970, the Bureau issued its letter decision, from which the instant appeal was taken, explaining the reasons for its rejection of the 43.59 acres. The decision below stated, in pertinent part:

> . . . C. W. Clark [sic] used 280 acres of his original 520 acres of lieu selection rights when he selected and received 276.41 acres in patent #986229. The 3.59 acres difference was forfeited due to the lieu selection right being in the nature of a land exchange in which patents are usually issued in public land survey units of 40 acres. Another 40 acres of Clark's [sic] selection rights were used in patent #1093346. This left 200 acres for which payment was made on November 5, 1969, in the above referenced case.
>
> The records show that patent #986229 was canceled as to 40 acres by the U.S. District Court, District of Arizona, on August 19, 1935 in United States v. Preston Nutter et al., No. E-149 (Prescott). This decree was based on a finding that the patent was issued upon false and fraudulent affidavits filed by Preston Nutter, transferee and successor in title to C. W. Clark [sic].
>
> The Act of March 3, 1905, 33 Stat. 1264, which repealed the Forest Lieu Selection Act of June 4, 1897, and others, contains the proviso: "That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issued therefor the same as though this Act had not been passed, and if for any reason not the fault of the party making the same, any pending selection is held invalid, another selection for a like quantity of land may be made in lieu thereof." (Emphasis supplied in the original)
>
> As patent #986229 was found invalid as to 40 acres due to the fault of the selector,

> Preston Nutter and his transferees and successors in interest are prohibited by the above cited statutory proviso from making another selection in lieu of the 40 acres canceled from the patent. . . .

The Bureau's rejection of the lieu selection right as to 40 acres canceled by the court in 1935 from patent No. 986229 because the cancellation was due to the fault of Preston Nutter, the selector, and thus would not come within the savings clause of the proviso to the Act of March 3, 1905, supra, is correct. The court found that the affidavit of adjustment filed by Preston Nutter was false and fraudulent. The adjectives "false and fraudulent" mean statements made with actual intent to deceive. 3/ This clearly places the fault for the cancellation of the patent upon Preston Nutter, the appellant's predecessor in interest, and appellant's contentions to the contrary that it did not forfeit its right to receive payment for 40 acres are clearly without merit, since the assignee is in no better posture than his assignor. Cf. 30 U.S.C. § 184(h)(2) (1970).

Appellant alleges that the obligation of the United States cannot be terminated by either regulation or law, quoting the following language of the United States Court of Appeals of the District of Columbia in Peale v. Davis, 19 F.2d 695 (1927), 4/ at 696, 697:

> It is clear that, under the act of 1897 [Act of June 4, 1897, supra] and the regulations of the department, the conveyance of the land to the government, accompanied by the application to select lands in lieu thereof, amounted to nothing more than a tender for exchange. If for any reason that selection was rejected, no obligation rested upon the party to make another selection, and upon his failure to make another selection the title to the lands tendered by deed could not under any conditions become absolutely vested in the United States. The action of the Department in this case is indefensible. It is here attempting to divest

---

3/ See BLACK'S LAW DICTIONARY 722 (4th ed. 1951).

4/ The result was changed by the Court on rehearing on other grounds, immaterial here, sub nom. Work v. United States, 26 F.2d 1002 (1928).

> a citizen of the United States of his privately-owned lands, without giving in return any compensation whatever. It is too elementary for discussion that this cannot be accomplished, either by act of Congress, or by the regulations of the department, or by both combined.

However, Peale is clearly distinguishable from Preston Nutter et al., in which the court cancelled the patent involved in the case at hand. In Peale, the selector had made the usual nonmineral affidavit as to the selected lands. An investigation by the Department of the Interior indicated that the selected lands might be oil lands, and consequently the Department called upon the selector for an additional affidavit as to the nonmineral character of the lands, which the selector refused to make. The Department attempted to forfeit the relinquished lands to the United States, holding that the selector was in fault under the proviso of the Act of March 3, 1905, supra, because of his refusal to make and file a further nonmineral affidavit. This did not constitute fraud as did the action in the instant Preston Nutter case. In fact, in Peale the court said that the selector "as he clearly had a right to do, and probably to avoid possible penalties for perjury, refused to make this additional affidavit."

We agree with the Bureau's rejection of the application for payment for the 3.59 acres. This odd acreage arose from the selection of unsurveyed lands in Arizona, which upon survey contained a lesser acreage than normal.

In Robert Leslie, 34 L.D. 578 (1906), the Department held (syllabus):

> A selection under the provisions of the act of June 4, 1897, for a less area than embraced in the relinquished land offered as base, not the result of mischance or misprision on the part of the local officers, is a waiver of the excess; and there is nothing in the act of March 3, 1905, repealing the act of June 4, 1897, authorizing the selector to make a further selection based upon such excess area.

The decision below rejected the 3.59 acres because a lieu selection right is in the nature of a land exchange. In Leslie, the Department set forth the rationale for treating a forest lieu selection right as an exchange right (and thereby involving the waiving of the excess). (Id. at 579, 580). Cf. Instructions of July 7, 1902, 31 L.D. 372.

Moreover, the Instructions, 49 L.D. 365 (1922) recite that "the land must be specifically described according to Government

subdivisions, and nothing less than a legal subdivision may be surrendered or selected." [Emphasis supplied.] See also Instructions, 50 I.D. 261 (1924).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision below is affirmed.

Anne Poindexter Lewis, Member

We concur:

Edward W. Stuebing, Member

Frederick Fishman, Member